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Supreme Court of the United States

OCTOBER TERM, 1995

PEOPLE OF THE STATE OF ILLINOIS,
Petitioner,

v.

ROSEMARY COATS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

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QUESTION PRESENTED FOR REVIEW

SHOULD POLICE OFFICERS BE PERMITTED TO PERFORM A PAT-DOWN SEARCH OF INDIVIDUALS PRESENT IN A PRIVATE PLACE DURING THE EXECUTION OF A SEARCH WARRANT?

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In The

Supreme Court of the United States

October Term, 1995

PEOPLE OF THE STATE OF ILLINOIS,
Petitioner,

v.

ROSEMARY COATS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

PRAYER

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

May It Please the Court:

The petitioner, the People of the State of Illinois, respectfully pray that a writ of certiorari issue to review the judgment of the Illinois Appellate Court, Third Judicial District.

OPINIONS BELOW

The decision of the Illinois Appellate Court, People v. Coats, 269 Ill.App.3d 1008, 647 N.E.2d 1088, 207 Ill. Dec. 595 (3d Dist. 1995), is attached as Appendix A. The order of the Illinois Supreme Court denying leave to appeal from the published decision of the Appellate Court is attached as Appendix B. The order of the Illinois Supreme Court denying a stay of the issuance of the mandate is attached as Appendix C and that court's order denying the motion to reconsider that order is attached as Appendix D.

JURISDICTION

The published decision of the Illinois Appellate Court was entered on March 16, 1995. The petitioner filed a timely petition for leave to appeal in the Illinois Supreme Court which was denied on October 4, 1995. This petition is filed within 90 days of the order denying leave to appeal as provided by Supreme Court Rule 13.1. This Court's jurisdiction is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution

Amendment (IV)

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The respondent, Rosemary Coats, was charged by indictment with unlawful possession of less than 15 grams of a controlled substance (cocaine). The respondent filed a motion to suppress evidence, challenging the legality of the search of her person during the execution of a search warrant. A hearing on the motion to suppress was held on August 27, 1993.

The facts were submitted to the trial judge by stipulation. (R. 17-19) On February 18, 1993, officers of the Peoria Police Department executed a search warrant at approximately 8:40 p.m. at 1218 South Greenlawn in Peoria, Illinois. (R. 17) Sgt. Richter and Officer Lambert proceeded to the front door of the residence, while other officers went to the rear of the residence. (R. 17) As Sgt. Richter and Officer Lambert were walking up the front steps, the respondent, Rosemary Coats, opened the front door of the residence. (R. 17) Sgt. Richter told her to "freeze" and announced that they were police officers. (R. 17) After hearing this, other officers entered the residence through the rear door of the home. (R. 17-18) Inside of the residence, the respondent was searched by police officer Patricia Taylor. (R. 18) During the search, Officer Taylor felt a hard, straight object in the respondent's right coat pocket. (R. 18) Officer Taylor believed that this object was a knife or weapon. (R. 18) Officer Taylor reached into the respondent's coat pocket and discovered that the object was a metal tube containing burned residue, which she recognized as a pipe for smoking crack cocaine. (R. 18) Then Officer Taylor reached into the respondent's left coat pocket and found suspected cocaine inside a clear plastic cigarette wrapper. (R. 18)

The only occupants of the residence were the respondent and two male juveniles. (R. 18) At the time of the search, the police officers had no evidence that the respondent was a resident of the home. (R. 22) However, she was the only occupant watching over the two juvenile boys in the residence. (R. 22)

Following arguments of counsel (R. 20-25), the trial judge took the matter under advisement. (R. 25) On September 3, 1993, the trial judge issued an order in which he granted the respondent's motion to suppress evidence. (R. 29) The trial judge believed that he was bound to follow the Illinois Appellate Court's decision in People v. Gross, 124 Ill.App.3d 1036, 465 N.E.2d 119, 80 Ill. Dec. 328 (3d Dist. 1984), which held that a search occurring on private premises does not result in a diminished expectation of privacy. (R. 30) Although the trial judge noted his personal agreement with the People's position in Gross (R. 29), the trial judge believed he was constrained by the holding in that case. Gross directed that mere occupants of the premises for which a search warrant is being executed cannot be subjected to a pat-down search regardless of whether those premises are public or private places. The trial judge recognized that in this case the residence had been identified as a place in which drug transactions occurred and the search warrant authorized a search of the residence and a male individual. (R. 29) Moreover, the trial judge found his ruling "distressing" because, in his belief, police officers have an inability to secure their safety during the execution of search warrants for private premises. (R. 29-30) Also, the trial judge stated, "Guns are to be expected as part of the affairs of the business of those dealing in drugs." (R. 29-30) The trial judge distinguished Ybarra v. Illinois, 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979), which was the basis of the appellate court's ruling in Gross, by noting that in Ybarra

a casual tavern patron can come in off the street for an entirely legitimate purpose. (R. 30) On the other hand, in a private residence it is unlikely that someone would casually enter a location that is known for drug distribution. (R. 30) However, the trial judge felt bound by the appellate court's ruling in Gross; therefore, he granted the respondent's motion to suppress. (C. 53; R. 29-31) Thereafter, the petitioner filed a notice of appeal (C. 57) and a certificate of impairment (C. 59).

On March 16, 1995, the Illinois Appellate Court, Third District, affirmed the trial judge's order suppressing the evidence. People v. Coats, 269 Ill.App.3d 1008, 647 N.E.2d 1088, 207 Ill. Dec. 595 (3d Dist. 1995) (copy attached as Appendix A). The appellate court declined the petitioner's invitation to overrule Gross. In the appellate court's opinion, to allow a frisk of everyone present during the execution of a search warrant "would be contrary to the fourth amendment and to the principles expressed in Ybarra." 647 N.E.2d at 1090. (See, Ybarra v. Illinois, 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979) (holding that patrons in a public tavern cannot be subject to a search simply because they are present when a search warrant is being executed on the premises).

On April 20, 1995, petitioner filed a timely petition for discretionary review in the Illinois Supreme Court. That court denied leave to appeal from the appellate court's decision by order entered on October 4, 1995 (Appendix B). On October 25, 1995, the petitioner filed a motion to stay issuance of the mandate, which was denied on November 13, 1995 (Appendix C). Subsequently, on November 27, 1995, the petitioner filed a motion to reconsider that order, which was denied on December 7, 1995 (Appendix D). Hence, the petitioner seeks review of the last decision of the Illinois courts and files this petition within 90 days of the Illinois

Supreme Court's refusal to review the decision of the Illinois Appellate Court.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI TO ADDRESS THE QUESTION LEFT OPEN IN MICHIGAN V. SUMMERS, 452 U.S. 692, 101 S.Ct. 2587, 2590, 69 L.Ed.2d 340 (1981), AND WHICH THE LOWER FEDERAL COURTS AND MANY STATES HAVE STRUGGLED TO RESOLVE, NAMELY WHETHER POLICE OFFICERS SHOULD BE PERMITTED TO PERFORM A PAT-DOWN SEARCH OF INDIVIDUALS PRESENT IN A PRIVATE PLACE DURING THE EXECUTION OF A SEARCH WARRANT.

In Michigan v. Summers, 452 U.S. 692, 101 S.Ct. 2587, 2590, 69 L.Ed.2d 340 (1981), this Court addressed the issue of whether the seizure and detention of occupants of private premises during the search of those premises was constitutionally permissible. This Court concluded that an occupant of the premises may be seized and detained while a search warrant for contraband is executed. 101 S.Ct. at 2594. However, this Court stated in Summers, "[T]here is no need to reach the question whether a search warrant for premises includes the right to search persons found [on those premises] ...." 101 S.Ct. at 2590. This petition for a writ of certiorari presents that question.

Recently, this Court declined to grant a petition for a writ of certiorari in a case involving an identical issue. See, Guy v. Wisconsin, cert. denied, ___ U.S. ___, 113 S.Ct. 3020, ___ L.Ed.2d ___ (1993) (Justices White and Thomas dissenting, while noting conflicting decisions regarding public and private premises). In State v. Guy, 172 Wis.2d 86, 492 N.W.2d 311 (Wisc. 1992), sub nom, Guy v. Wisconsin, ___ U.S. ___, 113 S.Ct. 3020, ___ L.Ed.2d ___ (1993), the

Supreme Court of Wisconsin held that a frisk of an individual present on private premises during the execution of a search warrant was constitutionally permissible. In the present case, the Illinois Appellate Court held to the contrary under identical facts. People v. Coats, 269 Ill.App.3d 1008, 647 N.E.2d 1088, 207 Ill. Dec. 595 (3d Dist. 1995). This conflict in authority, which also involves several jurisdictions, emanates from a disagreement over the interpretation of Ybarra v. Illinois, 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979).

In Ybarra, police officers executed a search warrant for narcotics at a tavern for both the premises and the person of the bartender. In the course of their search, police officers frisked a patron of the tavern and found heroin in his pants pocket. This Court held that the frisk of the patron was unconstitutional because there was no independent suspicion of criminal activity as to the patron. 100 S.Ct. at 342-43. However, as stated by 2 LaFave, Search and Seizure, §4.9(d), at 296:

> ... Ybarra is an easy case in light of [its particular] facts and ... because the premises were a public place then open for business, the police did not have to give notice prior to entry, and thus there was no reason to believe that occupants of the premises were engaged in an attempt to thwart successful execution of the warrant by concealing the heroin on their persons prior to police entry....

This petition for a writ of certiorari presents the more difficult issue of whether police officers can search

individuals present in a private location during the execution of a search warrant.

At the suppression hearing, the trial judge thought that he was bound by the appellate court's decision in People v. Gross, 124 Ill.App.3d 1036, 465 N.E.2d 119, 80 Ill. Dec. 328 (3d Dist. 1984). In Gross, the appellate court held that an occupant of private premises, as well as public premises, who is present during the execution of a search warrant cannot be searched absent some type of articulable suspicion that the occupant poses a threat to the safety of the officers. At the suppression hearing, the trial judge noted his personal disagreement with Gross. (R. 29) The trial judge believed that Gross expanded the holding of Ybarra by jeopardizing the safety of police officers and that police officers should expect guns when executing search warrants in private premises for drug dealers. (R. 29) In the instant case, the appellate court reaffirmed its decision in Gross. The appellate court stated:

> ... the differences between searches at public versus private places are not nearly great enough to justify completely abandoning the constitutional requirement of probable cause/reasonable suspicion that is particularized to the person being searched or frisked. We therefore decline the State's invitation to overrule Gross and we instead reaffirm our holding that mere presence at a private residence where an authorized search is taking place does not, without more, give rise to probable cause to search nor does it create a reasonable suspicion sufficient to justify a frisk for weapons.... [647 N.E.2d at 1090-91.]

The petitioner believes that the time is ripe for this Court to re-examine Ybarra and decide whether it is applicable to private as well as public places. Incidentally, Gross has subsequently been followed by another district of the Illinois Appellate Court in People v. Simmons, 210 Ill.App.3d 692, 569 N.E.2d 591, 155 Ill. Dec. 410 (2d Dist. 1991), and People v. Merriweather, 261 Ill.App.3d 1050, 634 N.E.2d 361, 199 Ill. Dec. 522 (2d Dist. 1994). However, yet another district of the Illinois Appellate Court has recognized a distinction between Ybarra and a passenger in a vehicle, thereby permitting a frisk of the passenger. See, People v. Allen, 268 Ill.App.3d 279, 645 N.E.2d 263, 267, 206 Ill. Dec. 258 (1st Dist. 1994) ("... it is much more likely a car passenger is a companion to the driver, and perhaps involved in the driver's criminal behavior, than the public customer in the tavern in Ybarra.") In any event, Michigan v. Summers, 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981), which is more fully discussed below, suggests the more desirable conclusion is to allow police officers to frisk those people present in private places during the execution of a search warrant.

The foundation for Gross and the instant case is this Court's decision in Ybarra v. Illinois, 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979). As stated earlier, in Ybarra, the police had obtained a search warrant for a tavern and its bartender. While executing the warrant, police officers frisked each of the customers present at the tavern. A cigarette package containing contraband was found on Ybarra's person. This Court held that the search warrant did not authorize the search of anyone other than the bartender. Thus, since there was no indication that Ybarra was violating any law or was engaged in any threatening conduct toward the police officers, he could not be searched simply because he was a patron of the bar.

The petitioner believes that Gross and the instant decision are incorrect because the basis of those holdings is Ybarra, which dealt with the search of a patron in a public tavern. Gross and the present case, unlike Ybarra, concern the search of an individual present on private premises during the execution of a search warrant. In Ybarra, this Court did not discuss the factor that the character of the premises, public versus private, could well affect the resolution of the question of whether there existed a reasonable belief or suspicion that the person in question was armed and dangerous to the officers.

However, the dissent in Ybarra did note the following about the "individualized suspicion" requirement of Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968):

> ... it has less significance in the present situation, where execution of a valid warrant had thrust the police into a confrontation with a small but potentially dangerous, [sic] group of people. First, in place of the requirement of "individualized suspicion" as a guard against arbitrary exercise of authority, we have here the determination of a neutral and detached magistrate that a search was necessary....
>
> In addition, the task performed by the officers executing a search warrant is inherently more perilous than is a momentary encounter on the street....To hold a police officer in such a situation to the same standard of "individualized suspicion" as might be required in the case of an on-the-street stop would defeat the purpose of gauging reasonableness in terms

> of all the circumstances surrounding an encounter. [100 S.Ct. at 350-51 (Justice Rehnquist, dissenting).]

Therefore, there are unique dangers attending the execution of a search warrant on private premises. Thus, it is the petitioner's position that anyone already present on private premises, which a neutral magistrate has already determined to be a likely site for drug distribution, is the subject of a reasonable individualized suspicion, justifying a frisk of that person for weapons.

Michigan v. Summers, 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981), reflects an increasing concern and awareness by the this Court of the dangers to police officers while executing a search warrant for private premises. In Summers, the issue was whether the seizure and detention of occupants of private premises during the search of that premises was constitutionally permissible. This Court indicated that, "[T]here is no need to reach the question whether a search warrant for premises includes the right to search persons found [on those premises] ...." 101 S.Ct. at 2590. This Court concluded that an occupant of the premises may be seized and detained while a search warrant for contraband is executed. 101 S.Ct. at 2594. This Court cited three law enforcement interests that justified this limited intrusion upon the rights of the occupants: (1) preventing flight in the event that incriminating evidence is found; (2) minimizing the risk of harm both to the officers and the occupants; and (3) the orderly completion of the search. 101 S.Ct. at 2594. Concerning the law enforcement interest of minimizing the risk of harm to the police officers, the Court noted:

> ... Although no special danger to the police is suggested by the evidence in this record, the execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence. The risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation.... [101 S.Ct. at 2594.]

Therefore, even though this Court did not address the issue of the search of persons present on private premises, it was fully cognizant of the attendant dangers to police officers while executing a search warrant at a private residence utilized for drug distribution.

In the instant case, as the police officers were about to execute the search warrant, the respondent had opened the front door. (R. 17) The only occupants of the premises were the respondent and two male juveniles. (R. 18) By outward appearances, the respondent was in control of the premises. This location had been the suspected site of drug distribution, a fact which had been crucial to a determination by an independent and neutral magistrate that there was probable cause to issue a search warrant. Given the fact that the police officers were entering private premises in which the occupants were suspected of drug distribution, the concealment of weapons on any occupant's person was possible, if not very probable. See, United States v. Pajari, 715 F.2d 1378 (8th Cir. 1983) (it is common knowledge, based on the personal experiences of law enforcement officers, that those suspected of trafficking in drugs are often armed).

Several courts have come to recognize the distinction that must be drawn between Ybarra and the facts of the instant case. These courts recognize that in balancing the safety concerns of police officers against the rights of the individual, the balance must be struck in favor of law enforcement when a search warrant is executed on private premises. This is especially true when those premises are the site of suspected narcotics distribution.

One of the most recent cases striking the constitutional balance in favor of the legitimate safety concerns of law enforcement is State v. Guy, 172 Wis.2d 86, 492 N.W.2d 311 (Wis. 1992), cert. denied, sub. nom., Guy v. Wisconsin, ___ U.S. ___, 113 S.Ct. 3020, ___ L.Ed.2d ___ (1993) (Justices White and Thomas dissenting, while noting the conflicting decisions regarding public and private premises). In Guy, police officers obtained a search warrant for private premises after an informant made a controlled purchase of cocaine from a male individual at the home. Inter alia, the search warrant authorized the search of the person of the male individual and the premises for narcotics. As the search warrant was executed, the defendant, a woman, was discovered sitting in the living room of the home watching television. After securing the premises, the defendant was frisked for weapons. Incidentally, the local police department had a policy of frisking everyone present for weapons while executing a search warrant for drugs in a private residence.

Nevertheless, during the course of the search, a police officer discovered a soft bulge in one of the defendant's pockets, which was found to be cocaine. At the suppression hearing, the officer who searched the defendant stated that she did not appear to be armed. Moreover, there was no evidence that the defendant made any type of movement indicating a possible threat to the safety of the officers.

Another police officer, who was present during the execution of the search warrant, testified that he had executed between 300 and 400 search warrants for drugs and that he had found weapons in most of those cases.

The Wisconsin Supreme Court held that the frisk of the defendant for weapons was constitutionally permissible. 492 N.W.2d at 316. Although the defendant relied on Ybarra to suppress the evidence, the state supreme court remained unpersuaded of its applicability to a search warrant executed on private premises. The court began its analysis by noting the directive of this Court in Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868, 1879, 20 L.Ed.2d 889 (1968). That is, in order to determine whether a search is reasonable, the need for the search must be balanced against the personal invasion of the individual's privacy that is entailed by the search. In Guy, the court noted that since Terry the need for police officers to protect themselves has greatly increased. In particular, the court stated:

> ... In 1966, when the Court decided Terry, "there were 23,851 assaults on police officers," and 57 officers were killed in the line of duty. Terry, 392 U.S. at 24 n. 21, 88 S.Ct. at 1881 n. 21. By 1990, the number of assaults on police had nearly tripled. In 1990, there were nearly 72,000 assaults on police officers, and 65 officers were feloniously killed. Department of Justice, Federal Bureau of Investigation, Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted (1990) at 41 (1991); .... [492 N.W.2d at 315.]

The court reasoned that in light of law enforcement experience, a reasonably prudent police officer would have

been justified in believing that his safety was in danger while executing the search warrant. The court recognized that:

> One of the reasons this belief would be reasonable is that weapons are often "tools of the trade" for drug dealers. See, e.g., United States v. Oates, 560 F.2d 45, 62 (2d Cir. 1977). This court has recognized that "[t]he violence associated with drug trafficking today places law enforcement officers in extreme danger." State v. Williams, 168 Wis.2d 970, 984, 485 N.W.2d 42 (1992); .... [492 N.W.2d at 315.]

Moreover, while cautioning that its holding does not necessarily place a constitutional imprimatur on the local police department's policy, the court noted the distinctions presented by the instant facts and Ybarra. The Supreme Court of Wisconsin stated:

> ... The frisk in Ybarra took place in a public tavern where people came and went and legally conducted business....[In this case, the police officer] came upon the defendant in a home where an informant had previously purchased drugs, a home that a magistrate had found probable cause to believe was the site of drug dealing. When a magistrate has determined that a residence is the probable site of drug trafficking, the occupants of that residence are "very likely" to be involved in drug trafficking.... [492 N.W. at 316.]

In its analysis, the court continued to note the crucial distinction between public and private places. It stated:

> Additionally, executing a search warrant in a home can be more dangerous than doing so in a public place. In a home, an officer has to deal with suspects on the suspects' own turf and can reasonably fear that persons found in the residence are presently armed or may have ready access to weapons.... [492 N.W.2d at 316.]

Therefore, in summary, the court concluded:

> ... Put another way, after balancing the intrusion that the frisk must have caused against the need for protecting [the police officer's] safety while she executed a search warrant for drugs in a private residence, we hold that the frisk was reasonable. [492 N.W.2d at 316.]

Several other courts are in accord with Guy in recognizing the distinction between public and private premises. See, State v. Shannon, 835 S.W.2d 406 (Mo. App. 1992); State v. Alamont, 577 A.2d 665, 667-68 (R.I. 1990); People v. Hughes, 767 P.2d 1201, 1203 (Colo. 1989); People v. Thurman, 209 Cal.App.3d 817, 257 Cal. Rptr. 517, 520-21 (1st Dist. 1989); State v. Harris, 95 N.C.App. 691, 384 S.E.2d 50, 53-54 (N.C. App. 1989), aff'd on other grounds, 326 N.C. 588, 391 S.E.2d 187 (N.C. 1990) (all holding that when police officers are executing a

search warrant for narcotics within a private residence, they have a lawful right to conduct a limited pat-down search for weapons upon the occupants present while the search is in progress). However, other jurisdictions hold to the contrary. See, State v. Weber, 64 Or. App. 459, 668 P.2d 475, 477 (Or. App. 1983); State v. Broadnax, 98 Wash.2d 289, 654 P.2d 96, 101 (Wash. 1982).

After the denial of the petition for certiorari in Guy v. Wisconsin, ___ U.S. ___, 113 S.Ct. 3020, ___ L.Ed.2d ___ (1993), the conflict among the jurisdictions has been exacerbated. For example, some jurisdictions continue to allow police officers to search individuals present in private places during the execution of a search warrant. See, State v. Range, 642 So.2d 1318, 1323 (La. App. 1994) ("A different holding in this case is likely to frustrate the purpose of search warrants issued on probable cause, allowing a person inside a residence subject to a search warrant to conceal targeted evidence within his clothing to prevent its seizure by the police.")

On the other hand, other jurisdictions continue to condemn searches by the police of people in private premises. See, Bell v. State, 845 S.W.2d 454 (Tex. App. 1993) (mere presence neither obviates nor satisfies the requirement of Terry that specific, articulable facts support an inference that the suspect might be armed and dangerous); State v. Vandiver, 257 Kan. 53, 891 P.2d 350 (Kan. 1995) (Ybarra does apply equally to searches conducted on private property or on property open to the public);

In addition, a conflict exists among the federal courts of appeal on this issue. In United States v. Reid, 997 F.2d 1576 (D.C. Cir. 1993), which is a very similar factual case, officers had a search warrant authorizing them to search a particular apartment for narcotics. Several officers were ascending a short flight of steps in a small apartment

complex. The defendant left the apartment to be searched and went down the stairs attempting to go past the officers. The defendant was stopped and patted down for weapons. Twenty-three bags of crack cocaine were found on the defendant's person. The court recognized that, as in the instant case, the defendant was not a resident of the apartment and did not have any proprietary interest in the premises. In urging the suppression of the evidence, the defendant relied on Ybarra. However, the court noted the distinction between public and private premises. It stated,

> ... Common sense suggests that there is a much greater likelihood that a person found in a small private residence containing drugs will be involved in the drug activity occurring there than an individual who happens to be in a public tavern where the bartender is suspected of possessing drugs. Police officers are not blind to these realities and we should not encourage them to be. [997 F.2d at 1578-79.]

In addition, the court considered the specific testimony of a police officer who stated that he felt endangered by the defendant's presence during the execution of the search warrant. 997 F.2d at 1579. Then, the court concluded that:

> ... There is more reason to suspect that an individual who is present in a private residence containing drugs is involved in illegal drug activity than someone who merely holds conversations with drug addicts in public places.... [997 F.2d at 1579.]

See also, United States v. Holder, 990 F.2d 1327 (D.C. Cir. 1993) ("Access to a private apartment, on the other hand, is presumably limited, and thus a person's admission to the apartment normally would raise a stronger inference of connection to the activities conducted within.") On the other hand, another federal court of appeals has held that the defendant's mere presence at the premises does not justify a pat-down search of his person. See, United States v. Sporleder, 635 F.2d 809 (10th Cir. 1980). Thus, Reid affirmed the trial judge's denial of the defendant's motion to suppress evidence. Although Reid placed strong reliance on the officer's testimony concerning the perceived danger, 997 F.2d at 1579, that risk should be readily apparent during searches of premises suspected to be the site of narcotics dealing. Guy, 492 N.W.2d at 315 (recognizing that weapons are often associated with narcotics dealers).

Consequently, there is a considerable difference of opinion among the state courts and the federal courts of appeals as to whether police officers can frisk individuals present in a private place during the execution of a search warrant. Therefore, review by this court is warranted to address the inconsistent holdings interpreting Ybarra.

CONCLUSION

This case presents an issue of considerable importance which this Court left unanswered in Michigan v. Summers, 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981). The issue, namely whether police officers should be permitted to perform a pat-down search of individuals present in a private place during the execution of a search warrant, has prompted a considerable amount of litigation. Several courts have reached conflicting conclusions on this issue based on their interpretation of Ybarra v. Illinois, 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979). Recently, this Court declined to address an identical issue in Guy v. Wisconsin, cert. denied, ___ U.S. ___, 113 S.Ct. 3020, ___ L.Ed.2d ___ (1993) (Justices White and Thomas, dissenting, while noting conflicting decisions regarding public and private premises).

In addition, the continuing conflict among the states and the federal courts of appeals has exacerbated since Guy. Moreover, additional litigation and controversy in this area is inevitable, especially given the current volume of drug prosecutions in this country and the frequent use of search warrants to discover narcotics in private places. Thus,

guidance from this Court is necessary. The petitioner respectfully requests that a writ of certiorari be granted.

Respectfully Submitted,

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Counsel for Petitioner

January 2, 1996

**Counsel of Record*

APPENDIX A

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT
March 16, 1995

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellant,

No. 93-0717 v.

ROSEMARY COATS,

Defendant-Appellee.

Appeal from the Circuit Court of Peoria County.
Honorable Joe R. Vespa, J., Presiding.

Justice SLATER delivered the opinion of the court:

Defendant Rosemary Coats was charged with unlawful possession of less than 15 grams of cocaine (720 ILCS 570/402(c) (West 1992)). Defendant's motion to suppress evidence was granted by the trial court and this appeal followed. We affirm.

At the hearing on the motion to suppress, the facts of this case were submitted by stipulation. On February 18, 1993, officers of the Peoria Police Department executed a search warrant at a residence in Peoria. As Sergeant Richter and Officer Lambert began to walk up the steps leading to the front door, the defendant opened the door. Sergeant Richter told the defendant to "freeze" and announced that

they were police officers. Other police officers forced open the rear door and entered the residence. Once inside, Officer Taylor searched the defendant and felt a hard object in her right coat pocket. Believing that the object could be a knife or other weapon, Taylor reached into the defendant's pocket and found what she recognized as a crack pipe. Officer Taylor then reached into defendant's left coat pocket and found a white rocky substance wrapped in a clear plastic cigarette wrapper.

The only occupants of the residence were the defendant and two male juveniles whom the defendant was watching. The defendant was not named or described in the search warrant and at the time of the search, the police had no evidence indicating that the defendant was a resident of the premises.

In ruling on the defendant's motion, the trial court expressed concern for the safety of police officers executing search warrants at premises identified as the site of drug transactions. Nevertheless, the court granted the motion to suppress on the basis of this court's decision in People v. Gross (1984), 124 Ill. App. 3d 1036, 80 Ill. Dec. 328, 465 N.E.2d 119. The State argues on appeal that Gross should be overruled. Alternatively, the State contends that the search was proper because the defendant had a sufficient connection to the premises.

In Gross this court held that a person's mere presence on private premises which are the subject of a search warrant does not, without more, give rise to probable cause to search that person, nor does it create a reasonable belief or suspicion sufficient to justify a frisk for weapons pursuant to Terry v. Ohio (1968), 392 U.S. 1, 88 S.Ct. 1868, 20

L.Ed.2d 889. The decision in Gross was premised on the Supreme Court's ruling in Ybarra v. Illinois (1979), 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238. In Ybarra the police obtained a search warrant for a tavern based on information that heroin was located on the premises and on the person of the bartender. While conducting the search, police officers frisked the customers and heroin was found in Ybarra's pants pocket. In holding that the search violated the fourth amendment, the Court stated that the requirement of probable cause to search could not be avoided "by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be." (Ybarra, 444 U.S. at 91, 100 S.Ct. at 342, 62 L.Ed.2d 245.) "[A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." (Ybarra, 444 U.S. at 91, 100 S.Ct. at 342, 62 L.Ed.2d at 245.) The Supreme Court also rejected the argument that the frisk of Ybarra was permissible under Terry because "the Terry exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked, even though that person happens to be on premises where an authorized narcotics search is taking place." Ybarra, 444 U.S. at 94, 100 S.Ct. at 343, 62 L.Ed.2d at 247.

In Gross the police executed a warrant to search the person and residence of Tom Sawyer. Kathleen Gross and four other non-residents were at Sawyer's apartment during the search. Gross's purse, which had been lying on a table near her, was searched and the police discovered cocaine. In affirming the trial court's order granting Gross's motion to suppress, this court considered the State's argument that Ybarra should be limited to searches carried out in public

places. The State argued then, as it does now, that the police face an increased danger in searching a private residence, particularly when the search is for drugs, because of the likelihood of the presence of weapons. In response, the Gross court stated that "Ybarra does not condition a person's expectation of privacy on the type of premises being searched and we will not alter that protection." (Gross, 124 Ill. App. 3d at 1039, 80 Ill. Dec. at 330, 465 N.E.2d at 121.) The court further noted that "[t]he fact that drug trafficking is often a risky business does not justify the assumption in all cases that every person present where a drug search is being conducted is inherently dangerous or is harboring weapons and contraband." Gross, 124 Ill. App. 3d at 1040, 80 Ill. Dec. at 331, 465 N.E.2d at 122.

While we recognize, as did the trial court, that there would be less risk to the police if they were allowed to frisk everyone they happen upon during a search, we believe that such a holding would be contrary to the fourth amendment and to the principles expressed in Ybarra. The position the State advocates would allow the police to search anyone present at the location to be searched, whether that person is a [sic] overnight houseguest, a friend visiting for the evening, a casual acquaintance who happened to drop by, a neighbor borrowing a tool, a delivery man or a babysitter. While the distinction between searches conducted on private versus public premises may warrant some relaxation of the probable cause/reasonable suspicion requirement (see, e.g., People v. Gutierrez (1985), 109 Ill. 2d 59, 92 Ill. Dec. 799, 485 N.E.2d 845 (suggesting that search of a person who is on private premises for which a warrant has been issued may be proper where there is a sufficient "connection" with the premises or with persons described in the search warrant)), the differences between searches at public versus private

places are not nearly great enough to justify completely abandoning the constitutional requirement of probable cause/reasonable suspicion that is particularized to the person being searched or frisked. We therefore decline the State's invitation to overrule Gross and we instead reaffirm our holding that mere presence at a private residence where an authorized search is taking place does not, without more, give rise to probable cause to search nor does it create a reasonable suspicion sufficient to justify a frisk for weapons. See People v. Merriweather (1994), 261 Ill. App. 3d 1050, 199 Ill. Dec. 522, 634 N.E.2d 361 (following Gross); People v. Simmons (1991), 210 Ill. App. 3d 692, 155 Ill. Dec. 410, 569 N.E.2d 591 (same).

The State also contends that the trial court erred in granting the defendant's motion to suppress because the defendant had a sufficient connection to the premises to allow a search. The State relies on section 108-9 of the Code of Criminal Procedure of 1963 (the Code) (725 ILCS 5/108-9) (West 1992)) which provides:

> "Detention and Search of Persons on Premises. In the execution of the warrant the person executing the same may reasonably detain to search any person in the place at the time:
>
> (a) To protect himself from attack, or
>
> (b) To prevent the disposal or concealment of any instruments, articles or things particularly described in the warrant."

This is the same statutory section that was at issue in Ybarra. Subsequent to Ybarra, our supreme court considered the meaning and scope of section 108-9 in Gutierrez, 109 Ill. 2d at 62, 92 Ill. Dec. at 800-01, 485 N.E.2d at 846-47, stating:

"Decisions interpreting section 108-9 have recognized that the section cannot authorize searches of persons merely because they are on premises for which a warrant has been issued, without violating constitutionally protected rights. Consequently, persons searched under the authority of this section must have a sufficient 'connection' with the premises or with persons described in the search warrant. [Citations.] Factors considered on the question of 'connection' have included the status of the person, where he resided, his conduct, and the purpose of his presence. It is clear, however, that the holding in Ybarra v. Illinois (1979), 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238, requires that independent probable cause must be shown in order to conduct a search of a person on the premises but whose search is not authorized by warrant. (Emphasis added.)

Although the State contends that Gutierrez provides that a search is permissible under section 108-9 when the person searched has a sufficient connection to the premises or where independent probable cause exists, the language emphasized above suggests to us that the Gutierrez court was interpreting Ybarra as requiring probable cause, rather than a mere connection to the premises. (See People v. Redmiles (1989), 191 Ill. App. 3d 198, 138 Ill. Dec. 557, 547 N.E.2d 724 (section 108-9 requires a sufficient connection to the premises and probable cause); but see Merriweather, 261 Ill. App. 3d 1050, 199 Ill. Dec. 522, 634 N.E.2d 361 (stating that section 108-9 requires a sufficient connection or probable cause); In re C.K. (1993), 250 Ill. App. 3d 834, 189 Ill. Dec. 601, 620 N.E.2d 569 (same); Simmons, 210 Ill. App. 3d 692, 155 Ill. Dec. 410, 569 N.E.2d 591 (same).) In any event, we need not resolve the issue of whether a search pursuant to section 108-9 requires

independent probable cause or whether some "connection" with the premises or person described in the search warrant is sufficient, because neither probable cause nor a sufficient connection exists in this case.

Ordinarily, a ruling on a motion to suppress will not be disturbed unless it is manifestly erroneous. (People v. Frazier (1993), 248 Ill. App. 3d 6, 187 Ill. Dec. 369, 617 N.E.2d 826.) Where, however, the facts and the credibility of the witnesses are not in dispute, the issue is subject to de novo review. (Frazier, 248 Ill. App. 3d 6, 187 Ill. Dec. 369, 617 N.E.2d 826; People v. Woods (1993), 241 Ill. App. 3d 285, 181 Ill. Dec. 818, 608 N.E.2d 1292.) Inasmuch as the facts in this case are stipulated, we will apply the de novo standard of review.

The State concedes, and we agree, that the police had no probable cause to search the defendant. We further find, however, that any connection between the defendant and the premises was too attenuated to support a search. Considering the factors referred to in Gutierrez, we note that the defendant's "status" was apparently that of a babysitter. The defendant's residence, according to the address listed on the indictment, was different from the searched premises. The totality of defendant's conduct consisted of opening the front door of the residence. The purpose of defendant's presence, as far as can be gleaned from the stipulated facts, was to watch two boys. Given these facts, even assuming that a sufficient connection to the premises will support a search, we find that the defendant's connection fails to meet this standard.

For the reasons stated above, the judgment of the circuit court is affirmed.

Affirmed.

LYTTON and MCCUSKEY, JJ., concur.

APPENDIX B

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62706
(217) 782-2035

October 4, 1995

State's Attorneys
Appellate Prosecutor
Third Judicial District
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Ottawa, Illinois 61350

No. 78988 - People State of Illinois, petitioner, v. Rosemary Coats, respondent. Leave to appeal, Appellate Court, Third District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 26, 1995.

Very truly yours,

/s/ Juleann Hornyak
Clerk of the Supreme Court

APPENDIX C

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62706
(217) 782-2035

November 13, 1995

Mr. Lawrence M. Kaschak
State's Attorneys
Appellate Prosecutor
628 Columbus St., Suite 300
Ottawa, IL 61350

In re: People State of Illinois, petitioner, v.
Rosemary Coats, respondent. No. 78988

Dear Mr. Kaschak:

The following order was entered this date in the captioned case:

> The motion by petitioner for stay of mandate pending the filing and disposition of a petition for writ of certiorari in the United States Supreme Court is denied.

Very truly yours,

/s/ Juleann Hornyak
Clerk of the Supreme Court

APPENDIX D

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62706
(217) 782-2035

December 6, 1995

Mr. Lawrence M. Kaschak
Staff Attorney
State's Attorneys
Appellate Prosecutor
628 Columbus St., Suite 300
Ottawa, IL 61350

In re: People State of Illinois, petitioner, v. Rosemary Coats, respondent. No. 78988

Dear Mr. Kaschak:

The following order was entered this date in the captioned case:

> The motion by petitioner to reconsider this Court's order of November 13, 1995, denying the motion to stay mandate pending the disposition of the petition for writ of certiorari in the United States Supreme Court is denied.

Very truly yours,
/s/ Juleann Hornyak
Clerk of the Supreme Court